

2023.04.28 Meeting Minutes
Commission on Indigent Defense Services
Quarterly Meeting – April 28, 2023
Location: NCAOC, Raleigh

Commissioner Attendees:

The Honorable Dorothy Hairston-Mitchell, Chair; Brian Cromwell; Tonya Barber (virtual); Caitlin Fenhagen (virtual); Karen Franco (virtual); Staples Hughes (virtual); Bryan Jones (virtual); Miriam Thompson (virtual)

Staff Attendees:

Chad Boykin (Assistant General Counsel, Financial Services), Kevin Boxberger (Regional Defender), Jamie Blackwell (Business Analyst), Amanda Bunch (Communications Specialist), D. Tucker Charns (Chief Regional Defender), William Childs (Budget Manager), Whitney Fairbanks (Deputy Director/General Counsel), Aaron Gallagher (Finance Officer), Angela Henderson (Contracts Administrator), Carla Huff (Recruitment and Training Coordinator), Stephen Lich (Senior Researcher), Mary S. Pollard (Executive Director), Chris Sadler (Research Director), Max Silva (Legal Assistant), Rebecca “Becky” Whitaker (Defender Policy and Planning Attorney)

Local and State Public Defender Program Attendees:

Woodrena Baker-Harrell (District 15B), Dawn Baxton (District 14), Laura Gibson (District 2), Burcu Hensley (Assistant Juvenile Defender), Lydia Hoza (District 27B), J. Chad Perry (Chief Special Counsel), Robert Sharpe (Capital Defender), Sam Sneed (District 28), Wendy Sotolongo (Parent Defender), Beth Stang (District 29B), Kevin Tully (District 26), Eric Zogry (Juvenile Defender)

Other Attendees:

John Rubin (UNC-SOG); Diane Upshaw (OSBM); Jackie Parker (OSBM)

Call to Order

The meeting was called to order by the Honorable Dorothy Hairston-Mitchell, who then proceeded with the welcome and invited all attending Commissioners to introduce themselves, followed by introductions of all attendees in the room and Commissioners online.

Adoption of Proposed Agenda

Commissioner Cromwell moved to approve the proposed agenda, with one minor addition: NC AOC Executive Director Ryan Boyce would be stopping in for a brief introduction and remarks. Commissioner Fenhagen seconded the motion. The agenda as amended was adopted unanimously.

State Government Ethics Act

Chair Hairston-Mitchell reminded the Commissioners of their responsibilities under the State Government Ethics Act.

Approval of January 27, 2023, Quarterly Commission Meeting Minutes

Commissioner Cromwell moved to adopt the minutes of the January 27, 2023, Commission meeting; Commissioner Jones seconded the motion. The minutes were approved unanimously.

Remarks from the Chair and Welcome New Staff

Chair Hairston-Mitchell expressed regrets she could not attend the January meeting and she shared her gratitude to Commissioner Joseph Crosswhite for his leadership at the January meeting. Hairston-Mitchell gave a special thank-you to IDS Executive Director Mary Pollard for her leadership, and to all IDS staff. The Chair wanted to recognize publicly that the IDS Executive Director and all IDS staff provide excellent services and are committed to properly supporting and ensuring that all public defenders, PAC attorneys, and others get what they need to do the work. She acknowledged that IDS staff also ensure the Commission goals and objectives are met. She thanked her fellow Commissioners for their time, and effort, and she further expressed appreciation for the patience of the Commission with all staff and defenders, as they each perform many roles and bring unique perspectives to the work.

Director Pollard reported that IDS is, for the first time in her tenure, fully staffed. She shared background details about the newest IDS staff, welcoming James Blackwell, Amanda Bunch, Carla Huff, Max Silva, and Rebecca Whitaker.

Remarks from newly appointed NC AOC Executive Director Ryan Boyce

The Chair introduced NCAOC Director Boyce and invited him to share remarks. Director Boyce thanked the entire IDS team for the work they do and for their partnership with NCAOC, and he expressed that the NCAOC will continue to assist in any way it can to support the work of providing indigent defense services across the state of North Carolina.

The Chair asked for all Chief Public Defenders attending online and for all other virtual attendees to introduce themselves.

Director's Report on IDS Business

The 2023 Legislative Session:

Director Pollard reported that last quarter a significant amount of time was spent working with stakeholders to keep them informed of the goals of the IDS Long Term Plan including promoting the expansion of PD Offices, and engaging in efforts to compensate PAC attorneys more fairly. She reported that feedback in districts without current PD offices was generally positive, both from judicial stakeholders and the attorneys who are doing indigent defense work on top of their retained caseloads.

Pollard provided highlights from the House version of the budget. Noting that legislative discussions were supportive of PD office expansion but, with limited funds to appropriate for IDS, she said it was unlikely that PAC attorney rates would be increased. The Senate Budget would be coming out soon, and Director Pollard encouraged all in attendance to nudge their representatives to support the chamber budget most beneficial to public defense when deciding on the certified budget to fund the agency through 2025. Other provisions from the House included funds to move

the IDS office site, funds for the document retention project, and an increase in the allotment to pay assistant public defenders.

Language regarding appointment of Chief Public Defenders, which was voted on by the Commission in January, was not included in either the House or Senate bills. Director Pollard stated that the IDS Executive Team and Commission members should be prepared to continue pushing for that change once again if it is not included in either bill or passed.

Pollard then turned the Commission's attention to strategic planning. She explained that OSBM requires a strategic plan from all state agencies every two years. The current draft IDS Strategic Plan was included in the meeting packet for review. Director Pollard stated it would be due May 5, and she invited Commissioners to provide feedback on the document.

Commissioner Hughes noted that the strategic plan included language about involuntary commitment cases (IVC). Director Pollard assured the meeting participants that IDS was working with J. Chad Perry, the new Chief of the Office of Special Counsel, to standardize how IVC cases are paid and attorneys are appointed across the state.

The Chair echoed appreciation for the plan's coverage of diversity, equity, and inclusion, and for continued collaboration with existing agencies and partners.

Pollard noted that future versions will include adopting a model conflict policy and updating key performance indicators and tracking data.

ICMS Rollout:

Director Pollard thanked IDS Regional Defender Kevin Boxberger for his tireless work navigating in and communicating about the eCourts Pilot program.

Director Pollard stated that the pilot had adversely affected ongoing set-off debt issues and noted that these issues would be addressed fully after the fiscal report.

Staff Reports

Updates on 2023FY Spending and Recoupment

Expenditures: IDS Fiscal Officer Aaron Gallagher reported that last year, IDS spent just over \$65.5 million on PAC. This year, IDS has already spent over \$61 million, only 10 months into the fiscal year. He attributed this in part to the rate increase of 2021. In line with projections from the Budget and Planning Director (William Childs), he expected IDS would finish the year, having spent around \$71-73 million for PAC. Gallagher stated that at this time, IDS will not have to withhold payments to attorneys for their work but, if current trends continue, this may change in the future years.

Last year, \$8.5 million total was spent on experts; this year, 10 months in, IDS has already spent almost \$9.5 million total for experts. This was attributed both to the clearing of a backlog of invoices and increased demand for experts in casework. Last year, in the PAC fund alone, IDS spent \$6.7 million for experts; this year, so far, IDS has spent almost \$7.7 million in the PAC fund for

experts. That said, Gallagher stated IDS may need more money. because it is exhausting its budget more rapidly than in prior years.

ICMS Rollout: Gallagher noted that, in the pilot counties, the numbers of fee apps processed for this time of year are comparable to last year's numbers with only a slight difference exist in the number of fee applications processed. Noting that Mecklenburg is next to go online with ICMS; he stated that, due to Mecklenburg's size, IDS will have better data on how the rollout of ICMS has or will affect the agency's ability to pay PAC. For now, IDS is not experiencing issues paying attorneys and the agency is spending at a steady rate.

Receipts and Recoupment through Set-off Debt: Gallagher noted that IDS anticipates meeting this year's projected estimate for receipts. Last year, receipts were about \$8.5 million, which almost met projected estimates. This year, the tax deadline was extended through April 18, and IDS anticipates a month or more of federal refunds being issued, which could potentially bring in more receipts for the IDS budget by way of interception of some of those funds. Some factors that have negatively impacted this recoupment include the rollout of ICMS, limited staff (two-member set-off debt team), and other restrictions imposed by the AOC.

Director Pollard added that historically, IDS had recouped about half a million dollars from set-off debt revenues in the pilot counties, especially from Wake. The ICMS set-off debt module was not finalized in time for the rollout and the workaround that was proposed did not work. Pollard stated she had been assured at a very high level that the rollout would not continue until the set-off debt module was completed and working properly.

She further explained that while IDS was working on the issue, they discovered that, even with this workaround, IDS would not be able to issue legally compliant intercept notices. In addition, the processing of the first "sweep" of tax refunds to DOR was not successful and staff estimated that IDS did not receive upwards of \$250,000 due to that error. Pollard expressed her hope that this will be worked out and assured the Commission that IDS staff would continue to work on set-off debt and fee application processing with NCAOC staff.

IDS Relocation: Childs provided the Commission with an update on IDS Administration and the State Defenders (Office and the Appellate, Capital, and Parent Defenders) relocation. Noting that the Durham lease was up in April 2024, Childs explained that:

- IDS Administration would likely move to Raleigh;
- Appellate, Capital, and Parent Defender Offices would likely remain in Durham; and
- The Office of Special Counsel, currently on Dorothea Dix Campus, would likely also have to move but would remain in Raleigh.

Childs requested the Chair appoint an ad hoc committee to assist making this decision. Chair Hairston-Mitchell said she would make appointments to the ad hoc committee as requested. Volunteers to serve were Staples Hughes, Brian Cromwell, and Bryan Jones. Others would be appointed later.

Relief from Civil Judgements / JATF Requests for Relief: Chad Boykin, Assistant General Counsel for Fiscal Services prefaced his report by noting that in January 2022 the Commission approved a process for the IDS Director to consider and grant relief from civil judgements on limited grounds. Since that time two petitions were heard. The first petition sought relief in the amount of \$7,369.26 on the principal debt of \$12,812.68. The petition was declined because basis for the request did not include any of the limited grounds upon which relief could be granted, however, the petitioner was allowed to request relief again in six months. The second request was granted on behalf of another client who met two of the authorized grounds. The relief granted, based on the principal debt of \$1,155.88, was \$695.88.

Remarks from the Defense:

Office of the Capital Defender: Capital Defender Rob Sharpe directed the commission to a draft form “Request for Appointment for Assistant Counsel in a Potentially Capital Case,” in the Commission packet. He explained that he drafted the form as part of pilot project designed to allow compensation for third seat attorneys at a reduced hourly rate. He expressed his opinion that an assistant counsel program would help to address quantitative and qualitative in his field. Sharpe noted that current capital counsel continued to struggle to meet increasing demand.

The “Assistant Counsel Plan” establishes requirements both to serve as assistant counsel and trial counsel’s duty to supervise. Trial counsel would have authority over the assistant counsel, would oversee their work, and would ensure they work within the Rules of Professional Conduct. The proposal would set the assistant counsel rate at \$40/hour with a hard cap of \$10,000 per case plus all related expenses. Assistant counsel expenses would be processed the same as expert expenses so no new systems would be needed to implement the program. OCD would exercise controls to monitor all costs approaching that \$10,000 mark. “Shadowing” is currently offered at a paralegal rate.

Commissioner Cromwell expressed concern that having less experienced attorneys to shadow cases could potentially hinder progress /slow things down as the trial counsel would spend extra time mentoring the assistant. Sharpe explained that trial counsel must complete the form and indicate that they understand what they are taking on and that they are willing to work with the less experienced lawyer. Sharpe acknowledged the concern but responded that he believed the supervision requirements were reasonable and that the program would help with recruitment.

Commissioner Cromwell then expressed concern that the requirement of a minimum of one year of experience was not enough. Commissioner Fenhagen agreed but offered that this would be appealing for newer attorneys who want to access to the capital roster.

Fenhagen added that while she understood that \$15/hour on cases was not enough and wondered if \$40/hour was. She asked if the eligible attorney would be required to have malpractice insurance, etc. She also asked whether consent from the client would be required.

Chair Hairston-Mitchell asked there would be CLE requirements. Sharpe he thought training would be an appropriate consideration.

Commissioner Hughes asked if Sharpe had “tested the waters” with trial counsel to see if they were interested in the plan. He further asked Mr. Sharpe what kinds of work duties the assistant counsel would have. Sharpe said he could think of two examples in the past month where the proposed plan might have been useful. He believed there is a need for assistance reviewing discovery, giving court presentations, cross examinations, giving directs. Assistant counsel would not be able try the case alone and trial counsel would have to certify that the client has agreed to the assistance. Sharpe’s fear was a floodgate; he said he would need to control over the number of times it is permitted.

Commissioner Jones stated he was opposed to paying an attorney a rate that is not an attorney rate, regardless of years of experience. He said a first chair and second chair attorney should be paid the same, with the first chair having additional requirements to be first chair. He said if an attorney passes the bar, they should be paid at the lowest attorney rate, (\$65/hour) at minimum, and not the lower rate or the paralegal rate.

Sharpe requested an allowance of the lower rate (\$40/hour). He stated that as of right now he was unsure how much of trial counsel’s time would be taken supervising the assistant attorney. The current rate for trial counsel is \$100/hour. Attorneys working in the de facto assistant counsel role are doing so at a \$15/hour. An increase to \$40/hour might entice even more to the work. He stated the OCD wanted to test this out. Commissioner Jones maintained that the district court rate \$65/hour should apply for these types of services.

Fairbanks advised that this is a program Director Pollard can implement pursuant to Rule 2, Continued Services in Capital Cases. Director Pollard added that IDS needs to be mindful of spending. She stated if the assistant counsel can do some of the work currently being done for \$100/hour, then \$40/hour could be a cost savings. Director Pollard if it could be structured as a pilot before making it a permanent program and stated she would be in support of paying the \$65/hour rate if it was a pilot. Chair Hairston-Mitchell stated unofficially that the Commission is in support of a pilot program.

Sharpe closed by reminding the Commission that there are currently 2,200 pending capital cases in North Carolina. In the last four consecutive months, OCD has reported the highest number of appointments to capital cases as previous months/years. Demand for forensic experts and cost generally are on the rise. Commissioner Hughes noted that excessive cost may be a reason to reevaluate capital punishment.

Office of the Parent Defender: Parent Defender Wendy Sotolongo gave her proposal to address retention in her field. She proposed a per-hour pay increase for certified child welfare specialists at local, trial, and appellate levels. She stated child welfare specialization is a growing field but noted that there currently are only six certified PAC in North Carolina. She proposed increasing the hourly rate for specialists by \$10/ hour, or from \$65/hour to \$75/hour for trial attorneys and from \$75/hour to \$85/hour for appellate attorneys. The increase for certified child welfare specialists would not impact the IDS budget because the money would come from the federal IV-E funding. A motion to approve the rate increase for child welfare specialists was made by Staples Hughes;

Miriam Thompson gave a proper second. The approval by the Commission was unanimous with seven votes.

Juneteenth: Before a short break, Dawn Baxton, Chief Public Defender from District 14 and current President of the NC Association of Public Defenders, was recognized by the Chair to update those in attendance about the upcoming Juneteenth event. “We are trying to make Juneteenth something other than regular business in the courts,” she said. To that end, the NCAPD and the NCCU School of Law Social Justice and Racial Equity Institute were planning an event to commemorate the event with a special program June 19 involving a panel discussion on race and democracy and the courts. This is a potential opportunity for CLE. Plans also include efforts to involve spoken word, music, other entertainment, etc. to make June 19 an event to be honored in North Carolina.

Commission Business:

IDS Commission Appointment to NCPLS Board: Kelly Manette is the current appointee and president of this board with a term expiring the end of June (June 23). Ms. Mannette made a written request to Chair Hairston-Mitchell for appointment to a second term on the NCPLS Board. The Chair opened the floor for discussion before proceeding with the reappointment. With no other new requests to serve on this board, the Commission decided to vet other names (at least one more name) before making the appointment. Chair Hairston-Mitchell read a list of the current membership of the board for information, noting that the Commission is responsible for only the seat currently held by Manette. She encouraged Commissioners to look at the current makeup of the board and to become familiar with the bylaws and Director Pollard provide additional reporting on the NCPLS contract in July. Commissioner Fenhagen agreed it would be fine to wait and stated that she would be in support of Manette’s reappointment. The matter was tabled until July 28.

IDS Rules and Policies:

Providing Legal Representation in Juvenile Murder Cases: Eric Zogry, Juvenile Defender, updated the commission on on OJD’s “Felony Juvenile Murder” program, involving juvenile first-degree murder life without parole cases. In January, OJD presented a set of rules for oversight. Per the Commission’s request, an ad hoc committee met on March 22 to look at the draft rules and policies. The Committee mad recommendations, which were reflected in tracked changes version of the draft rules provided in the meeting materials. Zogry asked the Commission to approve the rules.

Zogry stated the launch would be delayed from October 2023 to early 2024 due, in part, to pending legislation. Zogry assured the Commission that he would provide an update at the conclusion of the legislative session if any adopted legislation would affect the program. Commissioner Hughes asked about the pending legislation and Zogry explained that proposed Senate Bill 303 might change training requirements for juvenile defenders, but not jurisdiction.

Commissioner Jones moved to approve the new rules for providing legal representation in juvenile cases as presented by Zogry. Commissioner gave a proper second. The motion carried unanimously with seven votes.

Zogry advised that he planned to provide additional information, including a firm implementation date, at the July Commission meeting. Commissioner Hughes asked for some stylistic but no substantive changes. General Counsel Whitney Fairbanks stated that stylistic, grammatical, or typographical change could be made without further votes.

Quarterly Misconduct Report: Fairbanks shared with the Commission that the Bar had disciplined two attorneys who do indigent defense work, which were noted in the latest Bar Journal. At this time, there were no items for which she needed Commissioner input. One attorney had been suspended, and at the time when/if the suspension is stayed, there may be a need for Commissioners' input but that it also could be mooted soon.

Proposed Indigent Appointment Plan for Pender County added to District 5: Rebecca "Becky" Whitaker, Defender Policy and Planning Attorney, advised the Commissioners that she and Chief Public Defender Jennifer Harjo had developed an appointment plan for Pender County with only a few substantive changes from that of New Hanover County. One noteworthy change was the intentional departure from the training requirements on one of New Hanover County lists. The proposed plan was included in the packet. The only other changes made addressed typographical and stylistic changes. Pollard recommended that the Commission approve the proposed Appointment Plan for the Pender County appointment plan as submitted by Harjo and Whitaker. A motion was made by Commissioner Fenhagen with a proper second from Commissioner Thompson. The motion passed unanimously with seven votes.

Request for Waiver of One-year Fee Application Deadline:

Boyking presented a request by attorney David Herdman for waiver of the one-year deadline to file a fee application. The application was for a class C felony; the case was dismissed, so there are no recoupment issues. The amount was \$512.00. A motion was made by Commissioner Hughes and seconded by Commissioner Cromwell. All Commissioners present voted to grant the waiver and to make the payment at 100% without penalty.

Executive Session

Commissioner Hughes moved that the Commission went into Executive Session to consult with an attorney employed or retained by the public body to preserve the attorney-client privilege between the attorney and the public body pursuant to G.S. 143-318.11(a) (3). All Commissioners present voted to go into executive session. The minutes of the Executive Session are being withheld from public inspection pursuant to and to G.S. 143-318.11(a)(3).

Open Session

The Commission returned to open session and Chair Hairston-Mitchell reported that there would be a John Rubin "Rubie" Award. No other action was taken during the Executive Session.

The Chair adjourned the meeting at 3:25pm.

Next Meeting: July 28, 2023 (Virtual Only)